

89-407

Supreme Court, U.S.

FILED

AUG 1 1989

JOSEPH F. SPANIO, JR.  
CLERK

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1989

PHILLIP PAUL WEIDNER and DRATHMAN &  
WEIDNER, A Professional Corporation  
Petitioners,

vs.

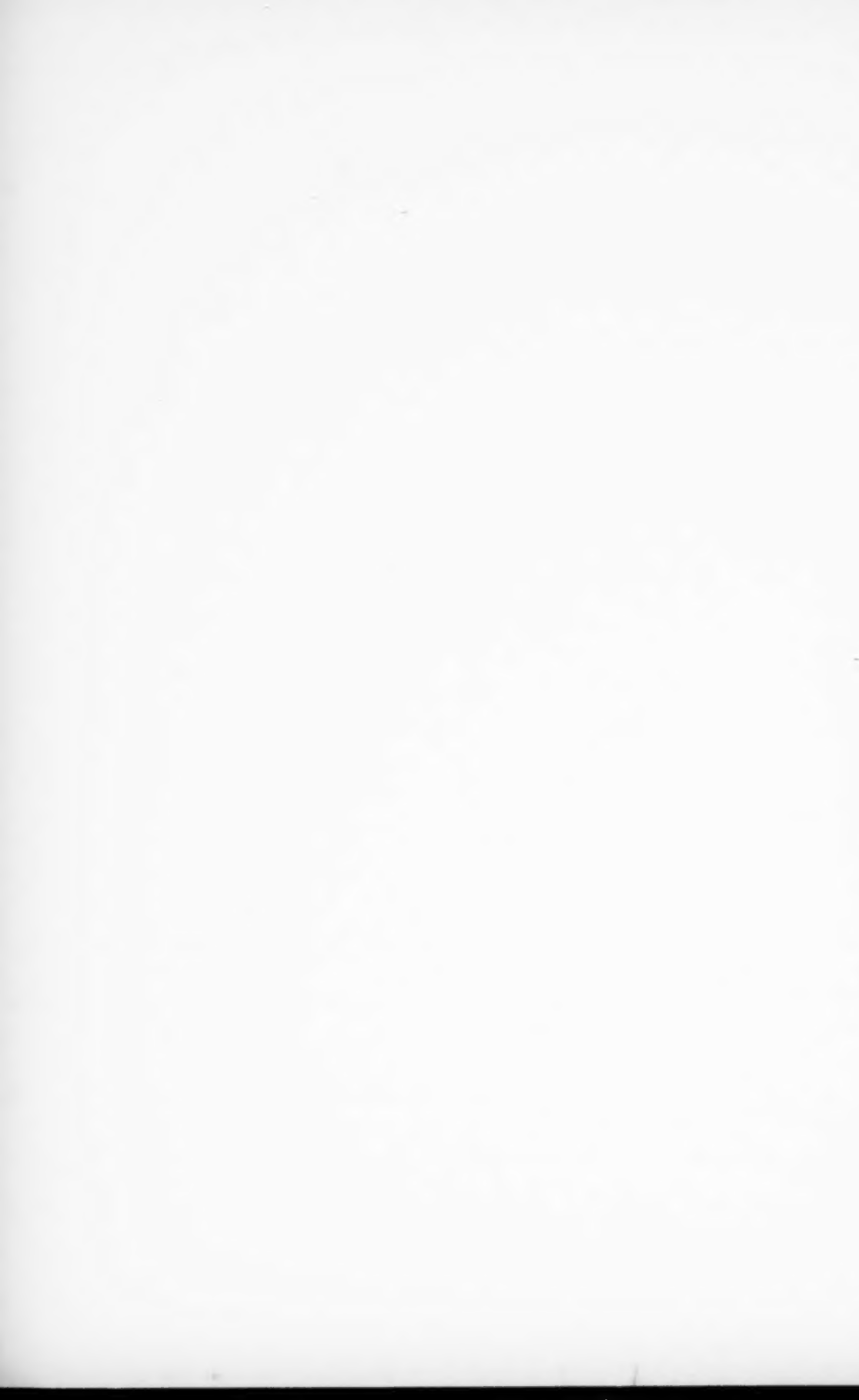
STATE OF ALASKA, SUPERIOR COURT FOR THE  
STATE OF ALASKA, THIRD JUDICIAL DISTRICT,  
Respondents.

APPENDIX TO PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF APPEALS OF  
THE STATE OF ALASKA

WEIDNER & ASSOCIATES, INC.  
A Professional Corporation  
PHILLIP PAUL WEIDNER  
Attorney for Petitioners  
330 L Street, Suite 200  
Anchorage, AK 99501  
(907) 276-1200

August 31, 1989

159



## TABLE OF CONTENTS

### EXHIBIT A

1

ORDER OF THE SUPREME COURT  
OF THE STATE OF ALASKA  
DENYING PETITION FOR HEARING  
IN PHILLIP PAUL WEIDNER and  
DRATHMAN & WEIDNER, A  
Professional Corporation v. STATE OF  
ALASKA; SUPERIOR COURT FOR  
THE STATE OF ALASKA, THIRD  
JUDICIAL DISTRICT, [SUPREME  
COURT FILE NO. S-3186] EFFECTIVE  
MAY 3, 1989.

### EXHIBIT B

3

FINAL OPINION OF THE COURT OF  
APPEALS OF THE STATE OF  
ALASKA DENYING MERIT APPEAL  
IN PHILLIP PAUL WEIDNER and  
DRATHMAN & WEIDNER, A  
Professional Corporation v. STATE OF  
ALASKA; SUPERIOR COURT FOR  
THE STATE OF ALASKA, THIRD  
JUDICIAL DISTRICT, [OPINION NO.  
871, FILE NO. A-420, November 25,  
1988, 764 P.2D 717].

WRITTEN ORDER OF JANUARY 5, 1989, OF THE COURT OF APPEALS OF THE STATE OF ALASKA DENYING PETITION FOR REHEARING IN PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation v. STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, CASE No. A-420.

PETITION FOR HEARING IN PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation v. STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, TO THE ALASKA SUPREME COURT, APPEAL NO. S-3186.

CONSOLIDATED NOTICES OF APPEAL TO THE ALASKA SUPREME COURT/ALASKA COURT OF APPEALS AS TO SANCTIONS OF DEFENSE COUNSEL DATED APRIL 20, 1984.



STATEMENT OF POINTS ON  
APPEAL AS TO SANCTIONS OF  
DEFENSE COUNSEL DATED APRIL  
20, 1984.

CERTIFICATE OF SERVICE BY MAIL



EXHIBIT A.

ORDER OF THE SUPREME COURT OF THE  
STATE OF ALASKA DENYING PETITION  
FOR HEARING IN PHILLIP PAUL  
WEIDNER and DRATHMAN & WEIDNER,  
A Professional Corporation v. STATE OF  
ALASKA; SUPERIOR COURT FOR THE  
STATE OF ALASKA, THIRD JUDICIAL  
DISTRICT, [SUPREME COURT FILE NO. S-  
3186] EFFECTIVE MAY 3, 1989.

IN THE SUPREME COURT OF THE STATE OF  
ALASKA

PHILLIP PAUL WEIDNER and	)	
DRATHMAN & WEIDNER, a	)	
Professional Corporation,	)	Supreme Court
	)	No. S-3186
Petitioners,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, SUPERIOR	)	
COURT FOR THE STATE OF	)	
ALASKA, THIRD JUDICIAL	)	Filed May 3
DISTRICT,	)	1989
	)	
Respondents.	)	
	)	

---

Court of Appeals No. A-420  
Trial Court Nos. 3AN 83-870/6502 Cr.

## ORDER

Before: Matthews, Chief Justice, Rabinowitz,  
Burke and Moore, Justices.\*  
[Compton, Justice, not participating]

On consideration of the petition for rehearing, filed on March 28, 1989, and the response to the petition, filed on April 12, 1989,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on May 1, 1989.

/s/ DAVID A. LAMPEN  
Clerk of the Court of Appeals

\*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

EXHIBIT B

FINAL OPINION OF THE COURT OF  
APPEALS OF THE STATE OF ALASKA  
DENYING MERIT APPEAL IN PHILLIP  
PAUL WEIDNER and DRATHMAN &  
WEIDNER, A Professional Corporation v.  
STATE OF ALASKA; SUPERIOR COURT  
FOR THE STATE OF ALASKA, THIRD  
JUDICIAL DISTRICT, [OPINION NO. 871,  
FILE NO. A-420, November 25, 1988, 764 P.2D  
717].

IN THE COURT OF APPEALS OF THE STATE OF  
ALASKA

PHILLIP PAUL WEIDNER and	)	
DRATHMAN & WEIDNER, a	)	
Professional Corporation,	)	
	)	
Appellants,	)	File No. A-420
	)	<u>OPINION</u>
v.	)	
	)	
STATE OF ALASKA, SUPERIOR	)	[No. 871 -
COURT FOR THE STATE OF	)	November 25,
ALASKA, THIRD JUDICIAL	)	1988]
DISTRICT,	)	
	)	
Appellees.	)	
	)	

---

Appeal from the Superior Court of the State  
of Alaska, Third Judicial District, Anchorage,  
J. Justin Ripley, Judge.

Appearances: Phillip Paul Weidner, Drathman & Weidner, and William P. Bryson, Anchorage, for Appellants. Cynthia M. Hora, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Grace Berg Schaible, Attorney General, Juneau, for Appellee.

Before: Singleton, Judge, Compton, Justice,\* and Greene, Superior Court Judge.\* [Bryner, Chief Judge, and Coats, Judge, not participating.]

GREENE, Judge.

Attorney Phillip Paul Weidner was ordered  
• to pay \$4,650.00<sup>1</sup> as sanctions for alleged violations

---

\*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

<sup>1</sup>The sanctions were imposed as follows:

July 28	\$100 & \$400
August 2	\$100 & \$100
August 16	\$100
August 17	\$500
August 24	\$100
August 26	\$250
September 6	\$500
September 13	\$500
September 14	\$500
September 21	\$500 & \$500 & \$500

of court orders during his trial defense of the defendant in State v. Stumpf.<sup>2</sup>

During the three-month trial in State v. Stumpf, there were numerous incidents which led the trial judge, J. Justin Ripley, to admonish or sanction Weidner for violating court orders. There were at least eight such incidents prior to the time that the court began imposing monetary sanctions. The sanctions generally increased in amount as the trial continued. The first imposition of a sanction was under the authority of AS 09.50.010(5) for direct contempt. The remaining sanctions were imposed under Alaska Civil Rule 95(b). Weidner has appealed the sanctions; he challenges the jurisdiction of this court to hear this matter, alleges he received inadequate notice of the violations, contends that he was improperly denied a hearing and the right to counsel, and asserts that the trial

---

<sup>2</sup>Stumpf's merit appeal was decided in Stumpf v. State, 749 P.2d 880 (Alaska App. 1988). That opinion may be consulted for additional facts regarding this case.

court's actions improperly infringed on his client's constitutional rights.

### EQUAL PROTECTION/JURISDICTION

Weidner first argues that requiring him to bring his appeal in this court, rather than directly to the Alaska Supreme Court, denies him equal protection of the law under both the United States and Alaska Constitutions. U.S. Const. amend. XIV, §1; Alaska Const. art. I, §1. This claim is based on the fact that attorneys who are sanctioned in civil cases appeal directly to the supreme court, while attorneys who are sanctioned in criminal cases must first appeal to this court. Compare Stephenson v. Superior Court, 697 P.2d 653 (Alaska 1985), with Weidner v. Superior Court, 715 P.2d 264 (Alaska App. 1986). Equal protection analysis under Alaska law differs somewhat from the federal test. Therefore, Weidner's federal and state claims will be examined separately.

Under the federal standard, legislation which treats similarly situated people differently is only



subjected to heightened scrutiny if it relies on suspect classifications or burdens rights deemed fundamental. See Clements v. Fashing, 457 U.S. 957, 962-73 (1982). Where that is not the case, the classification need only bear a rational relationship to a legitimate goal. Id. at 963.

The United States Supreme Court has never held the right to pursue a particular occupation a fundamental right for equal protection purposes under the United States Constitution.

The Supreme Court has applied only the rational relationship test in resolving equal protection challenges to regulations on the legal profession. See, e.g., Schware v. Board of Bar Examiner of New Mexico, 353 U.S. 232, 239 (1957). The federal courts also apply the rational relationship test in addressing equal protection challenges to regulations affecting other professions. See Iacobucci v. City of Newport, 785 F.2d 1354, 1355-57 (6th Cir. 1986), rev'd on other grounds, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 383 (1986);

Lowrie v. Goldenhersh, 716 F.2d 1002, 1012 (5th Cir. 1978).

The Alaska legislature established the court of appeals in 1980 exclusively to hear criminal appeals. AS 22.07.020. The creation of the court of appeals served two purposes: (1) it ensured that the state court system had adequate resources to resolve the volume of appeals with which it is faced; and (2) it established an appellate court with an expertise and specialized body of knowledge in criminal matters which enables it to efficiently resolve criminal appeals. These are legitimate legislative purposes.

Requiring that an attorney sanctioned in criminal proceedings first present an appeal to the court of appeals is rationally related to these defined goals. The court of appeals has original jurisdiction to hear appeals from criminal proceedings. There is no appeal as of right from a criminal matter to the supreme court. AS 22.07.020; AS 22.05.010(b). The court of appeals therefore has primary

responsibility for resolving legal issues which arise in criminal proceedings. It reasonably follows that the court of appeals has developed familiarity with the normal course of criminal proceedings in this state. As the question of whether a given action merits sanction depends on the specific facts of a particular case, a sanctioned attorney will likely benefit from the court of appeals' specialized knowledge of standard practice in criminal matters in courts of this state. Additionally, as the court of appeals has primary responsibility for establishing the controlling policies in criminal proceedings, it is rational to give this court primary responsibility for determining what practices are acceptable in those proceedings. Weidner has not established a violation of federal equal protection rights.

Weidner's claim under the state constitution fails for similar reasons. The Alaska Supreme Court has held that there is no fundamental right to pursue a specific occupation without hindrance. See Hilbers v. Anchorage, 611 P.2d 31, 40 (Alaska

1980); Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). In resolving equal protection challenges brought under the Alaska Constitution, our courts apply a single standard involving a comprehensive examination of the circumstances. The statute's purpose must be legitimate; the means chosen to attain that purpose must substantially further that purpose; and the state's interest in the method chosen must be balanced against the right infringed. See Apokedak, 606 P.2d at 1264; State v. Erickson, 574 p.2d 1, 12 (Alaska 1978). Under this standard, Weidner's state equal protection challenge also fails. The statutory purpose and the means to attain the purpose, as discussed above, are reasonable exercises of legislative authority. The fact that sanctions in criminal cases are reviewed as a matter of right by three members of the appellate bench instead of five does not require a different determination.

Under the system of appellate practice created by the legislature, the only difference between the procedures applicable to a civil-law practitioner who has been sanctioned and a criminal-law practitioner who has been sanctioned is the court of first review. The Alaska Supreme Court retains ultimate jurisdiction over matters of attorney admission and discipline. Any party who contends that any decision of this court regarding sanctions violates some general policy of the supreme court may present that argument through a petition for hearing. The Alaska Supreme Court, with its authority to grant discretionary hearing, is able to ensure that the decisions of this court are consistent with its policies and that no decision of this court regarding sanctions interferes with its powers to regulate the practice of law and attorney conduct.

#### ALLEGED INVALIDITY OF COURT ORDERS

Weidner alleges that several of the sanctions imposed were improper because the underlying orders were invalid. He argues that obeying them

would have entailed violating various of his client's constitutional rights. The validity of a court's order is not at issue in reviewing criminal contempt or sanctions under Civil Rule 95. Where a court has proper jurisdiction, its orders must be obeyed. A person may be punished for criminal contempt for violating a court's orders even if those orders are later found invalid. See Maness v. Meyers 419 U.S. 449, 458-60 (1975); United States v. United Mine Workers of America, 330 U.S. 258, 293-94 (1947). This rule has particular application to orders issued during trial. See Maness v. Meyers, 419 U.S. at 459. The trial judge must have the power to ensure that the proceedings are orderly and progress towards a conclusion. While counsel is entitled to establish an appellate record, that right does not include the right to violate the court's orders. If a trial judge errs, counsel must look to the appellate courts for relief from the order; counsel may not disregard or disobey the court's

orders. Weidner was not entitled to disobey the court's orders because he believed them incorrect.

#### ADEQUACY OF THE NOTICE AND HEARING

Weidner contends that he should have been given a post-trial hearing at which to defend himself against the contempt charges and that he received inadequate notice of which orders he allegedly violated. Judge Ripley imposed sanctions for direct contempt and additional sanctions under Alaska Civil Rule 95(b). The analysis differs based on the authority for the sanction.

No separate hearing is required where the sanction is imposed for actions constituting direct contempt committed in court in the trial judge's presence. See Weaver v. Superior Court, 572 P.2d 425, 429-30 (Alaska 1977); Alaska R. Civ. P. 90(a). On July 28, Judge Ripley specifically found Weidner in direct contempt and immediately imposed the penalty. Therefore, no hearing was required on that fine. Additionally, having reviewed the record, we find that notice was adequately given.

The other sanctions imposed in this case were imposed under authority of Alaska Civil Rule 95(b). Alaska Civil Rule 95(b) provides:

In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed \$500.00 against any attorney who practices before it for failure to comply with these rules or any rules promulgated by the supreme court.

The rule applies in criminal matters. Weidner, 715 P.2d at 265. Although Alaska Civil Rule 95 (b) requires that a sanctioned attorney receive a hearing, the amount of notice, the amount of time for the attorney to prepare, and the extensiveness of the hearing required depend on the facts of the case. Where the facts are straightforward and there is no showing that a more extensive hearing is necessary to present other evidence, a brief hearing on short notice may satisfy Alaska Civil Rule 95(b) requirements. Stephenson, 697 P.2d at 655-57. The trial court has



considerable discretion in determining the time of the hearing under Alaska Civil Rule 95(b).

In this case, having reviewed the record, we conclude that the trial court did not abuse its discretion in requiring immediate hearings on these matters. In the present case, all of the sanctions imposed were imposed for in-court violations of Judge Ripley's orders. In almost every case, the sanctions were imposed for Weidner's persisting in behavior which the court warned him was improper. In each instance in which sanctions were imposed, Judge Ripley explained why he was considering imposing sanctions and offered Weidner the opportunity to explain his actions. Most of the sanctions were imposed either for violations of the court's order to make prior application before questioning witnesses regarding prior bad acts or for questioning in prohibited areas. If Weidner had a good faith basis for his questions, or a valid reason for violating the court's restrictions, those justifications should have been

presented at the time sanctions were proposed. There was, therefore, no need for a separate post-trial hearing.

A review of each instance in which a sanction was imposed reveals that in almost all cases the trial court did not abuse its discretion in imposing sanctions and was not clearly erroneous in its findings. However, in our judgment, three incidents require further proceedings in the trial court.<sup>3</sup>

---

<sup>3</sup>On August 16, Judge Ripley imposed a \$100 sanction for an alleged violation of his order requiring court approval before certain "bad acts" evidence was introduced. During the cross-examination of Dr. Probst, Weidner asked about the consistency of "heavy use of opium" with a finding in the autopsy of Mr. Yi, the victim. Weidner defended based on the fact that the order went only to witnesses and Yi was not a witness. The court's comments indicate its erroneous belief that the order was applicable beyond "witnesses." The state argues that the question violated Alaska Evidence Rule 404 (a)(2)(i) and thus the sanction should be affirmed. However, it is not clear whether Judge Ripley would have imposed a sanction for violation of that provision rather than his order. Judge Ripley should consider that question in the first instance.

## JURY TRIAL

Weidner argues that he was entitled to a jury trial prior to the imposition of any of these sanctions. Clearly, he was not entitled to a jury trial prior to the imposition of sanctions under Alaska Civil Rule 95(b). See Weidner, 715 P.2d at 268. This

---

On August 24, the court imposed a \$100 sanction for asking a witness if she had been known as "Crazy Annie." The state applied for sanctions based on a violation of the "bad acts" order and Weidner's defense, to the extent one was raised, addressed that issue. While the trial court found no violation of the "bad acts" order, the trial court imposed sanctions for "degrading" the witness in violation of the rule which requires that questions not harrass or intimidate witnesses. Given these facts, Weidner was not given reasonable notice of the alleged violation.

On September 13, the court imposed a \$500 sanction for asking the witness Andreas, without prior permission of the court, about his possession of burglary tools. Weidner requested permission to review the record because he thought "that was a pending charge." In light of the fact that the court's order specifically excepted "the existence of criminal charges currently pending against a witness" from its application, it was error to deny Weidner an opportunity to check the record and prepare his defense to the sanction.

necessarily follows from the fact that imprisonment is not authorized as a penalty for Alaska Civil Rule 95(b) violations. While a jury trial is required when incarceration is a potential punishment for an allegedly contemptuous act, a simple hearing is adequate when there is no threat of imprisonment. Wood v. Superior Court, 690 P.2d 1225, 1233 (Alaska 1984), overruled on other grounds in DeLisio v. Superior Court, 740 P.2d 437, 439 (Alaska 1987); Weaver v. Superior Court, 572 P.2d 425, 431 (Alaska 1977); Continental Insurance Cos. v. Bayless and Roberts, Inc., 548 P.2d 398, 407 (Alaska 1976); Weidner, 715 P.2d at 268-69.

The analysis with respect to the single instance where Judge Ripley utilized his contempt powers differs from that applied to Civil Rule 95(b) situations. Whether a contemner is entitled to a jury trial turns on whether the purpose of the contempt proceeding is punitive (criminal) or merely coercive (remedial). Continental, 548 P.2d at 405. If the proceeding is merely coercive then no

jury trial is required because the contemner, even if incarcerated, holds the key to the cell in his or her pocket. E.L.L. v. State, 572 P.2d 786, 789 (Alaska 1977). See Johansen v. State, 491 P.2d 759, 764 (Alaska 1971). In contrast, if the purpose of the contempt proceeding is punitive (criminal) then the next step is to ask whether incarceration is a possible sanction. If the answer is yes, then a jury trial is required. See Continental, 548 P.2d at 405, 407. See also DeLisio v. Superior Court, 740 P.2d 437, 439 (Alaska 1987).<sup>4</sup>

On July 28, Judge Ripley found Weidner in direct contempt of his order to move on to other areas in cross-examining a witness, Trooper Olson, and imposed a fine of \$100. Although Judge

---

<sup>4</sup>In DeLisio, the court stated: "While it is true that a jury trial may be required when considering a criminal contempt, incarceration, per se, does not make the contempt criminal. '[T]here is no right to a jury trial in a civil contempt proceeding when the sole purpose of the proceeding is to compel the contemner to perform some act that he or she is capable of performing.'" 740 P.2d at 439 (citations omitted).

Ripley's comments illustrated a desire to deter future misconduct, the purpose of the sanction was clearly punitive.

Although the court was proceeding in criminal contempt, Weidner was not entitled to a jury trial. At the beginning of the hearing regarding the alleged contempt, the trial court specifically informed Weidner that "the issue [was] monetary sanctions and how much." Thus, there was no possibility of incarceration. See Johansen, 491 P.2d 766 n. 27 (whether criminal penalties may be imposed should be made clear at the outset of a contempt proceeding). Under AS 09.50.020, contempt under AS 09.50.010(5) for disobedience of a lawful court order may be punishable by a fine of not more than \$300 or by imprisonment of not more than six months only when a right or remedy of a party to an action or proceeding was defeated. In all other instances, such contempt is punishable by a fine not to exceed \$100. Judge Ripley was obviously proceeding under the latter remedy. We

conclude that the potential \$100 fine in this case was not so heavy that Weidner was entitled to a jury trial. Resek v. State, 706 P.2d 288, 291-93 (Alaska 1985). We also conclude that Weidner was aware from the outset that potential fines would not be so large that a jury determination would be required. See Wood, 690 P.2d at 1232-33. Weidner was not subject to incarceration nor a fine in an excessive amount; he had no right to a jury trial for his direct contempt.

#### JUDICIAL CHALLENGE

Weidner argues that he should have been afforded a hearing before another judge on the question of sanctions. An individual facing imposition of sanctions such as these is not entitled to a change of judge as a matter of right. Where the totality of circumstances indicates that the judge is prejudiced against counsel, counsel has the right to challenge the judge for cause. Weidner, 715 P.2d at 269. Weidner has not established a basis for a cause challenge.

The imposition of sanctions is AFFIRMED, in part, and REMANDED, in part, to the superior court for further proceedings consistent with this opinion.



EXHIBIT C

WRITTEN ORDER OF JANUARY 5, 1989, OF  
THE COURT OF APPEALS OF THE STATE  
OF ALASKA DENYING PETITION FOR  
REHEARING IN PHILLIP PAUL WEIDNER  
and DRATHMAN & WEIDNER, A  
Professional Corporation v. STATE OF  
ALASKA; SUPERIOR COURT FOR THE  
STATE OF ALASKA, THIRD JUDICIAL  
DISTRICT, CASE No. A-420.

IN THE COURT OF APPEALS OF THE STATE OF  
ALASKA

PHILLIP PAUL WEIDNER and	)	
DRATHMAN & WEIDNER, a	)	Court of Appeals
Professional Corporation,	)	No. A-420
	)	
Appellants,	)	
	)	
v.	)	
	)	
STATE OF ALASKA,	)	
SUPERIOR COURT FOR THE	)	
STATE OF ALASKA, THIRD	)	
JUDICIAL DISTRICT,	)	
Appellees.	)	
	)	

ORDER

Trial Court Nos. 3AN 83-870/6502 Cr.

Before: Singleton, Judge,  
Compton, Justice,\* and Greene,  
Superior Court Judge.\* [Bryner,  
Chief Judge, and Coats, Judge,  
not participating.]

On consideration of the petition for rehearing, filed on December 5, 1988,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on January 5, 1989.

/S/ DAVID A. LAMPEN  
Clerk of the Court of Appeals

\*Sitting by assignment made pursuant to article IV,  
section 16 of the Alaska Constitution.

EXHIBIT D

PETITION FOR HEARING IN PHILLIP  
PAUL WEIDNER and DRATHMAN &  
WEIDNER, A Professional Corporation v.  
STATE OF ALASKA; SUPERIOR COURT  
FOR THE STATE OF ALASKA, THIRD  
JUDICIAL DISTRICT, TO THE ALASKA  
SUPREME COURT, APPEAL NO. S-3186.

IN THE COURT OF APPEALS OF THE

STATE OF ALASKA

PHILLIP PAUL WEIDNER and	)
DRATHMAN & WEIDNER, a	)
Professional Corporation,	)
	)
Appellants,	)
	)
v.	)
	)
STATE OF ALASKA, SUPERIOR	)
COURT FOR THE STATE OF	)
ALASKA, THIRD JUDICIAL	)
DISTRICT,	)
Appellees.	)
	)

---

Court of Appeals No. A-420

PETITION FOR HEARING

I.

PRAYER FOR REVIEW

COMES NOW the Petitioners Phillip Paul Weidner and Drathman & Weidner, A Professional Corporation, by and through Phillip Paul Weidner and hereby Petitions this Court pursuant to Appellate Rule 301 et seq. to grant review of the Court of Appeals decision Opinion No. 871 dated November 25, 1988.

Attorney Phillip Paul Weidner was sanctioned on fourteen different occasions, once under the authority of AS 09.50.010(5) for direct contempt, and thirteen times under Alaska Rule 95(b) for a total of \$4,650.00, while defending Daniel Mozzetti with regard to first degree murder charges. The prosecution and the trial court often reacted to Mr. Weidner's questions out of the mistaken belief that he was violating court orders with no good faith basis, when, in fact, he was asking said questions for other tactical and strategic reasons that they still do not comprehend, but were in fact, founded upon a good faith basis.

This case involves the fundamental issues of an attorney's ability to defend himself and show cause why he should not be held in criminal contempt and/or sanctioned under Civil Rule 95, at the same time he is defending his client, where counsel's defense of himself may force counsel to violate attorney-client confidences, violate the client's rights against self-incrimination under the state and federal constitutions. The Court of Appeals did not address these important constitutional concerns in its opinion.

The Petitioner also contends that the Court of Appeals acted without appellate jurisdiction in this case. Pursuant to AS 22.05.010, the Supreme Court has jurisdiction over civil matters. The civil sanctions pursuant to Civil Rule 95 are not criminal actions or proceedings in which the Court of Appeals has appellate jurisdiction under AS 22.07.020. Therefore, Petitioner's one appeal as a matter of right from the Superior Court's action was properly brought in the Supreme Court.

(Petitioner initially filed his appeal in the Supreme Court).

Secondly, discretionary review to the Supreme Court results in unequal treatment, as civil attorneys appeals of sanctions are directly appealed to the Supreme Court, and criminal defense attorneys appeals can only be heard in the Supreme Court through a discretionary Petition for Hearing. This distinction is unconstitutional under the state and federal constitutions as a denial of equal protection and due process.

Petitioner was also denied the right to a jury trial as provided in the state and federal constitutions. Several issues exist that were never addressed by the Court of Appeals. First, at what point does the cumulative amount of the fines imposed become heavy enough to denote criminality so as to warrant a jury trial. Second, may the trial court evade the constitutional requirements of a jury trial by imposing fines formally classified as civil under Civil Rule 95,

while in substance imposing fines intended as a punitive penalty, to punish the petitioner for "criminal conduct."

In at least one instance, the trial court sanctioned the petitioner for violating a court order after the trial court realized that the order was in error. Where an order is so modified to divest the prior acts of counsel of improper character, the trial court should not be allowed to sanction the conduct. The Court of Appeals did not correctly analyze or discuss this issue.

The Petitioner also contends that many of the trial court's orders were (1) sufficiently vague so that there was not willful violation of the trial court; (2) that there was specific notice of the sanctions contemplated; (3) that petitioner has the right to a hearing after final disposition of the criminal charges against his client; (4) that petitioner should have a hearing before a judge other than the trial judge; (5) that the trial court's order that petitioner present proposed questions in

cross-examination prior to the prosecution's direct examination violated the state and federal constitutional rights to confrontation and cross-examination and effective assistance of counsel; and (6) that the conduct complained of was not contemptuous, unprofessional or unethical and thus, the trial court abused its discretion in sanctioning petitioner.

The Petitioner therefore, requests that the court grant review.

## II.

### STATEMENT OF FACTS

Attorney Phillip Paul Weidner was sanctioned on fourteen separate occasions by the trial court, for a total of \$465.00, while defending Daniel Mozzetti from first degree murder charges in State v. Mozzetti/Stumpf 3AN-83-870 Cr. These sanctions occurred between July 28, 1983, and September 21, 1983.

#### Sanction No. 1:



On July 28, 1983, the prosecution called State Trooper Greg Olson to testify concerning certain instructions Mr. Mozetti purportedly yelled to a witness while in the holding cells awaiting trial. The trial court erroneously refused to allow counsel access to a written police report in violation of Criminal Rule 16 and counsel objected to cross-examining the witness without the written statements. The trial judge specifically directed counsel to move along and leave the area and threatened to terminate cross-examination. The trial judge summarily terminated cross-examination and excused the witness over counsel's objection.

The trial judge then realized his error and allowed counsel access to the police report, realized his violation of Criminal Rule 16, and realized that the witness should not have been excused. Counsel was then able to develop significant "inconsistent" information in the police report crucial to cross-examination. Nonetheless, the court fined counsel

pursuant to AS 09.50.010(5) \$100.00 for direct contempt for the failure to "move along." The court denied counsel's request for a hearing before another judge.

Sanction No. 2:

The court had ordered that cross-examination as to character evidence be presented in writing beforehand. Carles Allen had testified that Sherry Schroeder had babysat for him. Counsel inquired of Mr. Allen about the drinking establishment, the "Moral Destiny," and Ms. Schroeder's activities therein. The prosecutor asked for sanctions as a violation of the court's order, which was denied.

A subsequent witness, Flabiano M. Macon, testified that he knew Ms. Schroeder only as a babysitter. Counsel asked Mr. Macon if he ever met her while she worked at the "Moral Destiny." Despite that fact that there had never been any prior specific orders precluding questions about Ms. Schroeder meeting Mr. Macon at the "Moral Destiny," and

that the court had allowed inquiries concerning Ms. Schroeder and the Moral Destiny earlier, the court fined Mr. Weidner \$400.00 for violating the court's order.

The court refused to accept Mr. Weidner's representations that he had a good faith basis for asking the question and explanation that the question was relevant as to the ongoing relationship between Mr. Macon and Ms. Schroeder. The court refused to respect counsel's assertion that it would invade his attorney-client request for an independent hearing.

Sanctions No. 3 and 4:

Robert and Barbara Hester had numerous conversations with Mr. Mozetti. Some of these conversations had been recorded. The prosecutor conceded that none of the supposedly inculpatory statements were made on the tape recorded conversations. The prosecution obtained an order precluding defense counsel from cross-examining the witness, Barbara Hester as to statements made

by Mr. Mozetti which were exculpatory. The court ordered that cross-examination could be had only as to those conversations that the state opened up.

After cross-examination was complete, the prosecutor moved for sanctions claiming that counsel asking Ms. Hester whether she was trying to get Mr. Mozetti to make admissions, and whether she was successful, violated the court's order. Further, a motion for sanctions were made as to counsel's inquiry about Ms. Hester telling Mr. Mozetti about the police coming around, alleging that there had been no prior offer of proof as to the conversations.

Counsel refused to defend himself at the same time he was defending his client, indicated he was in good faith, the orders were vague, and thus there was no specific notice, and he specifically requested a hearing. Counsel was fined \$100.00 for each alleged violation.

Sanction No. 6:<sup>1</sup>

The witness, Gerald Parent, had allegedly sold the murder weapon to Mr. Mozetti. Mr. Weidner asked the witness whether the prosecution had promised not to prosecute Mr. Parent for hindering prosecution if he told the same version at trial that he told before the Grand Jury. The prosecutor filed for sanctions and the court subsequently fined counsel \$500.00 for violation of Evidence Rule 103 without a right to a further hearing. The court did so in spite of the fact that a hearing had been held at which it came out that Mr. Parent had lied to police in an initial statement, and that Mr. Parent's attorney, believed, through conversations the same story at trial or at the Grand Jury proceedings.

Sanction No. 8:

---

1. Sanction No. 5 (August 16, 1983); Sanction No. 7 (August 24, 1983); and Sanction No. 10 (September 13, 1983) were reversed or remanded for further proceedings and will not be discussed herein. See Court of Appeals decision, footnote 3.

The witness, William Dublin, was called as an alibi witness for one Donald Smith. The prosecutor obtained protective orders regarding alleged hearsay statements made by Mr. Smith to Mr. Dublin. Mr. Dublin said that Mr. Smith was his roommate and that they were in their home in Kotzebue on December 29 and 30. Counsel's questions were not intended to elicit statements for the truth of the matter asserted, but merely to test the witness' perceptions that it was the 29th and 30th. Counsel specifically indicated to the court the reason for examination of the statements and asked for a clarification of the court's order. Counsel was fined \$250.00. Counsel asked for separate hearing, counsel, right to defend himself, and specific notice of objectionable questions. The court refused to give specific notice.

Sanction No. 9:

On September 6, 1983, counsel asked the victim's widow whether she had consulted an attorney about divorce action not long before the

victim's death. Counsel made a specific showing In Camera, but refused to reveal the name of the attorney who had revealed the specific representations. The Judge fined counsel \$500.00 even though revealing the source would have left that attorney subject to legal action for disclosing confidences by the widow of the victim and jeopardized the source of the information.

Sanction No. 11:

On September 14, 1983, cross-examination of Investigator Grimes revealed that a witness whose testimony was damaging to the state was arrested right after the testimony. The prosecutor moved for \$500.00 in sanctions, maintaining that there was no good faith basis to show that the arrest was linked to her testimony. Mr. Weidner asked for independent counsel, and ex parte in camera showing as to offer of proofs, and indicated that the prosecution was arresting witnesses harmful to them, while leaving others helpful to them to walk the streets free. The court claimed the question



violated the prior bad acts order and imposed \$500.00 in sanctions.

Sanctions No. 12, 13 and 14:

On September 21, 1983, Mr. Weidner was fined \$500.00 on three separate occasions during cross-examination of witness William Hendricks. William Hendricks testified to alleged incriminating statements Mr. Mozzetti made while Mr. Hendricks was in jail. Mr. Hendricks was in jail on a Class A felony of Sexual Assault in the First Degree which was later dismissed. Though the nature of the pending charges affected Mr. Hendricks perceptions of Mr. Mozzetti's statements, the court granted a protective order precluding reference to the nature of the charge and even the fact that it was a felony charge.

The trial judge fined Mr. Weidner for violation of a prior bad acts order for attempting to show that the true nature of the conversations between Mr. Hendricks and Mr. Mozzetti was that Mr. Hendricks was unhappy with his public



defender and wanted Mr. Mozzetti's assistance to investigate Mr. Hendricks case. Mr. Weidner's request for a full hearing was denied and he was fined pursuant to a bench conference when he had no opportunity to call witnesses or defend himself.

The trial judge again fined Mr. Weidner for asking whether Mr. Hendricks was released on bail, who posted his bail, and how much the bail was. Again, there was no opportunity for independent counsel, even though specific objection was made and Mr. Weidner specifically requested notice.

Finally, when Mr. Hendricks was asked to identify the woman who had filed the sexual assault charge against him, Mr. Weidner was fined \$500.00 despite the fact that he again asked for independent counsel and a right to independently defend himself.

### III.

#### STATEMENTS OF POINTS RELIED UPON FOR REVERSAL

- A. THE COURT OF APPEALS ERRED IN ITS ANALYSIS AS TO COUNSEL'S JUSTIFICATIONS AND THE NECESSITY FOR A SEPARATE HEARING.

##### The Court of Appeals Erred In Stating --

If Mr. Weidner had a good faith basis for his questions, or a valid reason for violating the court's restrictions, those justifications should have been presented at the time sanctions were proposed. There was, therefore, no need for a separate post-trial hearing.

As to do so would violate Mr. Mozzetti's constitutional rights.

The Appellate Court failed to address the central issue of an attorney's ability to defend himself at the same time he is defending his client and thereby violating the right of confidentiality and the Fifth Amendment right against self incrimination.

In Maness v. Meyers, 419 U.S. 449, 460-61 (1975) the court noted that compliance with a court

order can "cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released." Id. at 460. See also McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980). The Alaska courts have recognized this problem faced by counsel in holding that in some instances a continuance should be granted until after the conclusion of the criminal proceedings against the client before a hearing and defense of the sanctions, in order for defense counsel to show cause without jeopardizing his client's rights. Weidner v. State, 715 P.2d 264 (Alaska 1986).

B. THE COURT OF APPEALS ERRED IN DETERMINING THAT IT HAD JURISDICTION.

If the actions for contempt and Civil Rule 95(b) sanctions against counsel were in the nature of civil proceedings, then the Court of Appeals, while having appellate jurisdiction over the criminal appeal of Mr. Mozzetti, had no

jurisdiction over the civil appeal of Mr. Weidner pursuant to AS 22.07.020 and AS 22.05.010.

Furthermore, civil counsel has a right of direct appeal to the Alaska Supreme Court. See Tobey v. Superior Court, 680 P.2d 782 (Alaska 1983). If criminal counsel is forced to appeal to the Alaska Court of Appeals, then review before the Supreme Court is merely discretionary pursuant to Appellate Rules 301 et sequel.

In Rinaldi v. Yeager, 86 S.Ct. 1497, 1500 (1966) the court stated:

This court has never held that the states are required to establish appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

There are no valid distinctions between civil attorneys and criminal attorneys justifying the different appellate rights of review under the federal and state equal protection and due process analysis. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976); State v. Erickson, 547 P.2d 1 (Alaska 1978).

C. THE ALASKA COURT OF APPEALS ERRED IN HOLDING THAT THE VALIDITY OF A COURT'S ORDER IS NOT AT ISSUE IN REVIEWING CRIMINAL CONTEMPT OR SANCTIONS UNDER CIVIL RULE 95.

The Court of Appeals held that the validity of the trial court's orders are not at issue. "Where a court has proper jurisdiction, its orders must be obeyed." Opinion at p. 7. However, the U.S. Supreme Court in Maness, supra, did hold that where compliance could cause irreparable damage to the client's rights, particularly important constitutional rights such as the right against self-incrimination, counsel need not comply and will not be accountable for sanctions if counsel's position is upheld on appeal. Maness, supra, 419 U.S. at 460-61. Therefore the Court of Appeals erred in holding:

If a trial judge errs, counsel must look to the appellate courts for relief from the order; counsel may not disregard or disobey the court's orders. Weidner was not entitled to disobey the court's orders because he believed them incorrect.

Such a rule of law would have a chilling effect of the constitutional rights of criminal defendants, is contrary to the law (See Maness, supra) and improper if it leads to compliance with an order at the cost of the client's constitutional rights.

Second, in one instance, the trial court acknowledged that its earlier orders were in error. In 17 Am. Jur.2d Contempt, §48, (1964) it is stated:

Where an injunction is so modified as to divest the prior acts of the defendant entirely of their illegal and improper character, an attachment for violation of the injunction may not be sustained.

Id. at 52.

Where the trial Judge acknowledged that it was in error, on July 28, 1983, and thus the actions of counsel were not improper, it was error to sanction the actions of counsel in that instance.

D. THE COURT OF APPEALS ERRED IN HOLDING THERE WAS NO RIGHT TO A JURY TRIAL.

While the Court of Appeals characterized the majority of the sanctions as "civil," the clear intent was punitive and to punish for prior acts. See Wood v. Superior Court, 690 P.2d 1225 (Alaska 1984); Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970).

According to Baker, supra, the right to jury trial would extend to "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term." Id. at 402. "A heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community." Id. at 402, n. 29.

The extreme nature of the fines and sanctions imposed constitute a serious imposition on counsel's professional reputation. Furthermore, while in Wood it was held that no right to a jury trial attached under Civil Rule 95 (b), said fines were limited to \$500.00, and in this case, if the Court



of Appeals decision is allowed to stand, a judge could repeatedly sanction counsel for each question. Thus, in essence, it could impose fines without limit and without a right to a jury or other procedural safeguard. In this case, Judge Ripley used civil contempt bases as an excuse to deny Mr. Weidner the procedural rights due for criminal contempt. See Weaver v. Superior Court, 572 P.2d 425 (Alaska 1977).

Furthermore, the Court of Appeals erred in:

(1) Denying counsel a right to a hearing. See Tobey v. Superior Court, 680 P.2d 782 (Alaska 1983);

(2) Denying a hearing before a judge other than Judge Ripley - especially where counsel had filed a preemptory challenge to Judge Ripley alleging bias before trial. Weidner, supra, 715 P.2d at 269.

(3) Determining that the trial judge's sanctions, except for one, were civil contempt based - as stated previously. The court used the civil



contempt powers to impose what were in effect criminal sanctions - See Weaver, supra; Baker, supra.

(4) Upholding the trial judge's summary findings of contempt as the conduct complained of was not contemptuous, unprofessional or unethical - People v. Kurz, 192 N.W. 2d 594, 598-99 (Mich. App. 1971); Harris v. U.S., 382 U.S. 162 (1965); In the Matter of Gorfele, 442 A.2d 934 (D.C. Cir. 1984). Furthermore, it must be clearly shown that the misbehavior actually and materially obstructed the judge in performance of judicial duties and that there was wrongful intent. In re Dellinger, 461 F.2d (7th Cir. 1972). Furthermore, there must be a willful failure to comply with a court order. Iohansen v. State, 491 P.2d 759 at 767 (Alaska 1971).

(5) In upholding the trial judge where the court's orders were sufficiently vague as to leave room for misunderstanding that the orders were being violated, thus, there was no willful failure to comply and furthermore, lack of notice. See

Iohansen, supra: Continental Insurance Company v. Bayless & Roberts, 548 P.2d 398, 405 (Alaska 1976); Weaver, supra.

(6) Upholding the trial judge's sanctions when they were based on invalid court orders. As stated previously, in Maness, supra, where compliance will cause irreparable harm to a client's constitutional rights, counsel may disobey an order and will not be liable for sanctions if the court's order is held invalid on appeal. The trial judge erred in sanctioning counsel for failure to comply with orders that proposed questions or that cross-examination be presented prior to cross. This denies effective cross-examination under the 6th Amendment of the U.S. Constitution and Article I, Section II of the Alaska Constitution. See Davis v. Alaska, 415 U.S. 308, 315 (1974); Chambers v. Mississippi, 410 U.S. at 295.

In addition, the trial court improperly sanctioned counsel for cross-examining a witness in areas opened up on direct by the prosecution.

#### IV.

CONCRETE REASONS WHY ISSUES PRESENTED  
ARE OF IMPORTANCE BEYOND THIS  
PARTICULAR CASE AND WHY REVIEW  
SHOULD BE GRANTED PURSUANT TO  
APPELLATE RULE 304

A. The decision of the Court of Appeals is in conflict with state and federal constitutional principles, as well as being in conflict with other courts. The Court of Appeals held that an attorney must obey a court's orders without qualification. (Opinion page 7). This is in conflict with Maness v. Meyers, supra, 419 U.S. 449, 460-61, which recognized that in certain situations, counsel may disobey a court's orders and challenge its correctness, especially where a client's fundamental constitutional rights may be compromised. In addition, the Court of Appeals held that counsel should have defended himself during the trial, while Weidner v. Superior Court, 715 P.2d 264 (Alaska App. 1986) recognized that if counsel's defense of himself could jeopardize his client's

constitutional rights, a post trial hearing could be held.

B. The Alaska Court of Appeals decided that jurisdiction of criminal defense attorney sanctions is properly in the Court of Appeals and that it is not a denial of equal protection and due process to provide different appeal avenues for civil attorneys and criminal defense attorneys. This question has not been decided by the Alaska Supreme Court.

Furthermore, the Alaska Supreme Court has not decided at what point the fines levied against counsel are so heavy that constitutional procedure safeguard, such as jury trial, should be provided to counsel.

Also, important constitutional questions concerning (1) the ability of an attorney to defend himself without jeopardizing his client's rights; and (2) whether counsel is required to obey all court's orders, even if it violates his client's

constitutional rights, have not been addressed by the Alaska Supreme Court.

C. The Court of Appeals decided significant questions of law that have not been addressed by the Alaska Supreme Court. See § (a) and (b) supra.

D. A decision here will have significant consequences to others than the parties of the present case and is reasonably necessary to further the administration of justice.

The ability of counsel to fully and zealously represent his client, without jeopardizing the client's constitutional rights and to ensure a fair trial is at stake. Will counsel be forced to defend himself at the risk of his client's rights? Must counsel obey an order, which counsel considers incorrect, even if it will deprive his client of constitutional rights that cannot be remedied on appeal? Can the trial judge impose heavy fines and evade the procedural safeguards provided for criminal sanctions by imposing them, under the

civil sanctions rule and to intimidate counsel into foregoing client's rights against self-incrimination, effective assistance of counsel, and right of confrontation?

The serious ramifications and consequences to the concept of a judicial system which requires a vigorous independent bar as an indispensable part of the system of justice is not limited to this case and must not be ignored. See In re McConnell, 370 U.S. 230, 236 (1962).

For the reasons cited above, Petitioner requests that the Alaska Supreme Court grant the Petition for Hearing.

RESPECTFULLY submitted this 28th day of March, 1989.

/S/ MICHAEL COHN FOR  
PHILLIP PAUL WEIDNER

EXHIBIT E

CONSOLIDATED NOTICES OF APPEAL TO THE  
ALASKA SUPREME COURT/ALASKA COURT OF  
APPEALS AS TO SANCTIONS OF DEFENSE  
COUNSEL DATED APRIL 20, 1984.

IN THE SUPERIOR COURT FOR THE STATE OF  
ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

DONALD STUMPF, a/k/a  
DANIEL MOZZETTI,

Defendants.

---

STATE OF ALASKA, Superior  
Court for the State of Alaska,  
Third Judicial District,

Plaintiffs/Appellees,

vs.

PHILLIP PAUL WEIDNER, and/or  
DRATHMAN & WEIDNER, a  
Professional Corporation,

Defendants/Appellants,

---

Case No: 3ANS 83-870 Cr.

(In Re: Any Applications for Sanctions as to  
Phillip Paul Weidner and/or Drathman &  
Weidner, a Professional Corporation)

CONSOLIDATED NOTICES OF APPEAL TO THE  
ALASKA SUPREME COURT/  
ALASKA COURT OF APPEALS AS TO  
SANCTIONS OF DEFENSE COUNSEL

NOTICE is hereby given pursuant to Appellate Rule 204, and AS 22.05.010, AS 22.07.020, and Civil Rule 77, Civil Rule 95, Civil Rule 11, and the Rules of Procedure of the Alaska Bar Association with regard to discipline, that Drathman & Weidner, a Professional Corporation, and/or Phillip Paul Weidner, hereby appeal to the Alaska Supreme Court/Alaska Court of Appeals from the Orders entered by the Honorable J. Justin Ripley summarily fining counsel and making summary findings as to purported contempt of Court and/or violations of the Alaska Bar Disciplinary Rules, and further which assessed total sanctions in the approximate amount of \$5,500.00.<sup>1</sup>

---

1. In consideration of judicial economy, Defendants/Appellants are filing Consolidated Notices of Appeal with regard to the various orders, sanctions, findings of fact, and conclusions of law, appealed from. However, Defendants/Appellants maintain they have a right to independent counsel with regard to each separate appeal as to each separate sanction or order insofar as there may be



In further compliance with the applicable appellate rules and statutes the following is set out:

1. The parties taking the appeal are Drathman & Weidner, a Professional Corporation, and/or Phillip Paul Weidner.

2. The judgments or parts thereof appealed from are the sanctions imposed in open Court by Judge Ripley pursuant to motion by the prosecution on July 28, 1983, August 2, 1983, August 16, 1983, August 17, 1983, August 24, 1983, August 26, 1983, September 13, 1983, September 15, 1983, and September 21, 1983, and any purported findings of fact and conclusions of law made to support said sanctions.<sup>2</sup>

---

different considerations involved with regard to same, and further have a right to file adequate briefing as to each order or sanction.

Thus, at the present time, while one appearance is being entered with regard to the consolidated appeals, further substitutions of counsel may be forthcoming with regard to the separate issues involved.

2. The instant Notices of Appeal are made pursuant to Appellate Rule 204(a)(6) which provides in pertinent part:

---

(6) **Premature Appeals.** If a notice of appeal is filed after the announcement of a decision but before the date shown in the clerk's certificate of distribution on the judgment, the notice of appeal shall be treated as filed on the date shown in the clerk's certificate of distribution on the judgment. (Emphasis added).

The initial Orders complained of were entered in open Court between the approximate dates of July 28, 1983 and September 21, 1983. A Stay was obtained as to all proceedings involving applications and/or Orders and/or appeals and/or motions to reconsider as to said sanctions until ten days after sentencing and final judgment, since given the ethical obligations and considerations involved, it was necessary for counsel to wait until Mr. Mozzetti was finally sentenced and an appropriate notice of appeal was filed on his behalf prior to filing an appeal on behalf of undersigned counsel and/or Drathman & Weidner, a Professional Corporation. The initial stay was obtained such that said matters would be stayed until ten days after verdict, and further, a written motion requesting a stay until ten days after sentencing and final judgment was filed on October 4, 1983. While the Order signed by Judge Ripley read that said stay was until January 23, 1984, said Order was entered when sentencing was set for January 13, 1984, and said sentencing was continued once due to the fact that the prosecutor was in trial in State v. Arnold on January 13, 1984, and another continuance was obtained pursuant to a request by the presentence officer on the grounds that extra

---

time was necessary for the presentence officer to complete the presentence report. Accordingly, final sentencing and judgment with regard to Mr. Mozzetti was not entered until March 22, 1984. Despite the fact that a written judgment was entered in a similar situation in State v. Main, Case No. 3ANS 82-8254, and In Re: Weidner and Drathman & Weidner, a Professional Corporation, and appeal was taken from said written judgment, no written judgment to date has been executed by Judge Ripley with regard to the sanctions in question such that the provisions of Appellate Rule 204(a)(1) with regard to the date shown in the Clerk's certificate of distribution of the Judgment do not yet apply. With regard to each of the sanctions in question, timely Motions to Reconsider were filed within ten days of the Court's ordering same in open Court, and accordingly since action by the Court with regard to said motions to reconsider were stayed until ten days after verdict and sentence, and further since Civil Rule 77 provides in pertinent part said motions are deemed denied within twenty days of the date of filing unless the Court acts with regard to same, the date on which said Motions to reconsider would be deemed denied would appear to occur on April 21, 1984, thirty days after sentence and judgment. In order to comply with both the thirty day provision of Appellate Rule 204(a) with regard to thirty days from the date of Mr. Mozzetti's final sentence and judgment and further in order to allow the Court twenty days after the expiration of the Stay in order to act with regard to the motion to reconsider, the instant notice of appeal is being filed contemporaneously with the Notice of Merit

3. The Court to which the appeals are taken are the Alaska Supreme Court/Alaska Court of Appeals.<sup>3</sup>

---

Appeal and Sentence appeal filed on behalf of Mr. Mozzetti.

3. Pursuant to AS 22.05.010 and AS 22.07.020, and the equal protection clause of the United States and Alaska Constitutions, and the right to due process under the United States and Alaska Constitutions, this appeal is taken directly to the Alaska Supreme Court. That is, Defendant/Appellants maintain that they have the right of direct appeal to the Alaska Supreme Court under the Alaska Constitution, Article IV, Section 2, and any statute interposing a discretionary hurdle via the Alaska Court of Appeals is an unconstitutional denial of due process and equal protection under both the 14th and 5th Amendments to the United States Constitution and the comparable provisions of the Alaska Constitution insofar as it applies to defense counsel in criminal cases and does not apply to defense counsel in civil cases and further does not apply to civil litigants. A similar issue was raised sua sponte by the Alaska Supreme Court with regard to the appeal file in Phillip Paul Weidner and Drathman & Weidner, a Professional Corporation, Appellants, vs. Superior Court of the State of Alaska, Third Judicial District, Appellees, Supreme Court Case No. S-103, (In Re: Any Applications for Sanctions of Phillip Paul Weidner and/or Drathman & Weidner, a Professional Corporation), Superior Court Case No. 3ANS 82-8254 CR, and said appeal was transferred over objection to the Alaska Court of

Defendants/Appellants maintain they have a right to said appeal directly to the Alaska Supreme Court; however, if the Court will not entertain this notice to the Alaska Supreme Court, then the Defendants/Appellants appeal to the Alaska Court of Appeals over objection and continue to maintain they have said right.

In further compliance with the Rules of Appellate Procedure Statement of Points on Appeal, Designation of Records and Transcript Request Orders are filed herewith.<sup>4</sup>

---

Appeals. The pleadings filed by Defendant/Appellant in said matter are incorporated herein by reference as if fully set out. However, should the Court rule that jurisdiction for this appeal does not lie with the Alaska Supreme Court then this appeal is taken to the Alaska Court of Appeals, over objection, and Defendant/Appellants preserve their full rights to seek appropriate relief from the Alaska Courts or the Federal Courts with regard to the denial of equal protection and due process engendered by the discriminatory treatment of appeals of this nature as to counsel for criminal defendants as opposed to appeals from sanctions of counsel for civil defendants or appeals for civil litigants.

4. Note that it is the intent of Defendant/Appellants to appeal from all sanctions,

\_\_\_\_\_ RESPECTFULLY SUBMITTED this 20th day  
of April, 1984.

/s/ PHILLIP PAUL WEIDNER

---

findings of fact, and conclusions of law imposed. Insofar as the record in the instant proceeding is voluminous, (i.e., approximately three months of trial), and has not yet been transcribed, should a specific sanction order not have been fully designated, then said order will be supplemented with due diligence upon completion of a transcript.



EXHIBIT F

STATEMENT OF POINTS ON APPEAL AS  
TO SANCTIONS OF DEFENSE COUNSEL  
DATED APRIL 20, 1984.

IN THE SUPERIOR COURT FOR THE STATE OF  
ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DONALD STUMPF, a/k/a )  
 DANIEL MOZZETTI, )  
 )  
 Defendants. )

---

STATE OF ALASKA, Superior )  
 Court for the State of Alaska, Third )  
 Judicial District, )  
 )  
 Plaintiffs/Appellees, )  
 )  
 vs. )  
 )  
 PHILLIP PAUL WEIDNER, and/or )  
 DRATHMAN & WEIDNER, a )  
 Professional Corporation, )  
 )  
 Defendants/Appellants, )

---

Case No: 3ANS 83-870 Cr.  
(In Re: Any Applications for  
Sanctions as to Phillip Paul Weidner  
and/or Drathman & Weidner, a  
Professional Corporation)

STATEMENTS OF POINTS ON APPEAL

COME NOW the Defendants/Appellants,  
Phillip Paul Weidner, and/or Drathman &  
Weidner, a Professional Corporation, and hereby  
state that they rely upon the following points on  
their appeals as to the above referenced matters:

1. The trial court erred in denying the  
Motions to Reconsider Orders with Regard to of  
Defense Counsel filed with regard to the sanctions  
of defense counsel, said Motions to Reconsider filed  
on August 3, 1983, August 17, 1983, September 1,  
1983, September 19, 1983, and September 23, 1983.

2. The trial court erred in failing to grant  
the Defendant's Requests for a Jury Trial with  
regard to the sanctions at issue, said Requests for  
Jury Trial filed on August 3, 1983, August 17, 1983,  
September 1, 1983, September 19, 1983, and  
September 23, 1983.



3. The trial court erred in failing to grant the Defendant's Requests for Rights to Discovery, Argument, Confrontation, Cross-Examination and to Call Witnesses as to the sanctions at issue, said Requests filed on August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

4. The trial court erred in failing to grant the Defendant's Requests for Rights to Discovery, Argument, Confrontation, Cross-Examination and to Call Witnesses as to the sanctions at issue, said Requests filed on August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

5. The trial court erred in failing to grant appropriate Motions for Pre-Emptory Disqualification of Superior Court Judge, or in the Alternative Notice of Change of Judge filed with regard to the motions for sanctions at issue, said motions for per-emptory disqualification filed on

August 3, 1983, August 17, 1983, September 1, 1983, September 19, 1983, and September 23, 1983.

6. Mr. Weidner and Drathman & Weidner, a Professional Corporation, were never granted their full rights to a hearing, and/or to a jury trial, and/or to a hearing before a judge, and/or to a hearing before another judge, and/or to call witnesses, to confrontation and cross-examination, and/or to discovery, and/or to due process, and/or to the advice and assistance of independent counsel, and/or their own independent constitutional and statutory rights prior to the issuance by the Court of the purported findings and orders and sanctions.

7. Due to the fact that counsel was defending Mr. Mozzetti with regard to serious criminal charges, (first degree murder and hindering prosecution), at the time of the motions and orders complained of and since the facts and legal issues with regard to the State's motions for sanctions and the Court's findings as to sanctions

were intertwined with considerations which involved Mr. Mozzetti's rights to counsel, right to remain silent, rights against self incrimination, rights to confidentiality of the attorney/client privilege, right to cross examine and confront witnesses, right to call witnesses, right to discovery and to investigation, it was inappropriate to force counsel to take a detailed specific position with regard to the motion for sanctions or the Court's orders in that regard until representation had terminated as to the underlying criminal charges against Mr. Mozzetti and there had been a final disposition with regard to same. To do so violated the rights of Mr. Mozzetti and/or Drathman & Weidner, a Professional Corporation, and/or Phillip Paul Weidner as to counsel, to the confidentiality of the attorney/client relationship, to remain silent, against self incrimination, to call witnesses, to confrontation and cross examination, to a jury and/or court trial, to due process, and to practice law.

8. There was no direct contempt involved by the conduct of Mr. Weidner and any purported findings as to indirect contempt can only be made after the Court has followed all the constitutional, statutory and common law due process procedures with regard to said charges including appropriate hearing and/or jury trial and/or hearing before another judge, allowing the rights to call witnesses, to confrontation and cross examination, and/or to discovery, and/or to due process and/or the advice and assistance of independent counsel.

9. It would be unconstitutional and inaccurate to attempt to characterize the conduct of Mr. Weidner as direct contempt so as to deny all of the constitutional, statutory and common law rights including appropriate hearing an/or jury trial and/or hearing before another judge, allowing the rights to call witnesses, to confrontation and cross examination, and/or to discovery, and/or to

due process and/or the advice and assistance of independent counsel.

10. Insofar as any of the purported findings and orders purport to make any decisions and impose sanctions as to allegations concerning disciplinary rules of the Bar, the jurisdiction of this matter does not lie with the Superior Court but rather should have been referred to the Bar so that Mr. Weidner and Drathman & Weidner, a Professional Corporation could exercise their full constitutional and statutory and common law due process rights pursuant to said proceedings and further, any action with regard to purported violations of disciplinary rules are more properly before the Supreme Court after appropriate Bar proceedings.

11. There was no proper notice of purported Court Orders or charges, nor was there adequate notice as to any purported Orders violated, or notice of the nature of said alleged violations so as to enable counsel to defend against same.

12. After all the relevant facts are a matter of record, once Defendants/Appellants have had an adequate opportunity to defend and exercise their full rights and further had said right to defend and exercise their full rights free from the constraint of ethical obligations due to the nature of the representation of Mr. Mozzetti, it will be apparent that there was no conduct by Mr. Weidner which amounted either to direct or indirect contempt and there were no violations of the Code of Professional Responsibility or the Bar Disciplinary Rules or any knowing or willful violation of any of the Court's valid Orders.

13. After all the relevant facts are a matter of record, once Defendant/Appellants have had an adequate opportunity to defend and exercise their full rights and further have had said right to defend and exercise their full rights free from the constraint of ethical obligations due to the nature of the representation of Mr. Mozzetti, it will be apparent that in light of the apparent circumstances

and facts, any order granting sanctions is not appropriate under the applicable Constitutional rights, statutes, and rules.

14. The Orders and sanctions were inappropriate since for counsel to have proceeded otherwise would have violated the defendant's rights to remain silent, against self incrimination, to effective assistance of counsel, to the confidentiality of the attorney/client relationship, to cross-examination and confrontation, to call witnesses, to discovery and to investigation, such that counsel's ethical obligations precluded him from proceeding otherwise.

RESPECTFULLY SUBMITTED this 20th day of April, 1984.

/S/ PHILLIP PAUL WEIDNER



## EXHIBIT G

### CERTIFICATE OF SERVICE BY MAIL

I hereby certify, that pursuant to Rule 21, Rule 28.2, Rule 28.5 (b), and Rule 33 of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the United States Supreme Court in good standing, and that three (3) copies of the foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon counsel for the Respondent/Plaintiff by depositing same in the United States mail at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Cynthia Hora  
Assistant Attorney General  
Office of Special Prosecutions and Appeals  
1031 W. 4th Avenue, Suite 318  
Anchorage, AK 99501

and further that three (3) copies of the foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon



the Attorney General of the State of Alaska by depositing the same in the United States mail, at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Douglas B. Baily  
Attorney General  
Box K  
Juneau, AK 99811

DATED at Anchorage, Alaska, this <sup>21<sup>st</sup></sup>~~31<sup>st</sup>~~ day of <sup>September</sup>~~August~~, 1989.

WEIDNER AND ASSOCIATES  
Phillip Paul Weidner &  
Associates, Inc.  
A Professional Corporation

By: Phillip Paul Weidner  
PHILLIP PAUL WEIDNER  
330 L Street, Suite 200  
Anchorage, Alaska 99501  
(907) 276-1200  
Attorney for Petitioners